BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

JOHN POSTEMA,

Petitioner,

v.

SNOHOMISH COUNTY,

Respondent.

CASE No. 15-3-0011

(*Postema)*

FINAL DECISION AND ORDER

SYNOPSIS

On September 2, 2015, Snohomish County adopted Amended Ordinance No.15-034, updating its critical areas regulations as required by RCW 36.70A.130(1)(c). John Postema filed a timely petition for review, alleging the critical areas regulations applicable to agricultural activities disregarded best available science, created inconsistencies, and thwarted the Growth Management Act (GMA) goal to enhance agriculture. The Board determined Mr. Postema failed to meet his burden of proving noncompliance with the GMA, and the petition was dismissed.

THE CHALLENGED ACTION AND BACKGROUND

The Growth Management Act requires cities and counties to adopt and periodically review and amend development regulations protecting environmentally critical areas. RCW 36.70A.060(2); RCW 36.70A.130(1)(c). Because Mr. Postema's dispute arises in the context of a series of regulatory revisions, the Board first summarizes the County's process.

In 2007, Snohomish County adopted Amended Ordinance 06-061 which established the current structure of the County's critical areas regulations, codified in chapters SCC 30.62A – wetlands and fish and wildlife habitat conservation areas, SCC 30.62B –

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geologically hazardous areas, and SCC 30.62C – critical aquifer recharge areas.[1] The 2007 critical areas regulations (hereafter "2007 CAR") were not immediately applied to all agricultural activities because of the passage of state legislation which placed a moratorium on critical area amendments relating to agricultural land pending study by the Ruckelshaus Institute (hereafter "Ruckelshaus timeout").[2] Accordingly, the 2007 CAR expressly exempted farming from the new environmental rules, and Snohomish County's pre-2007 critical areas regulations remained in effect for agricultural activities in rural areas and in agricultural resource lands.[3]

Mr. Postema was an active contributor to the public process that developed the 2007 CAR. A number of his letters and comments in the County's 2005-2006 record are submitted as exhibits to his briefs in this proceeding.[4] Certain aspects of the 2007 CAR were challenged by environmental organizations that asserted protections were not as robust as required by best available science ("BAS").[5] However, because of the Ruckelshaus timeout, agricultural issues were not a part of that litigation.

In 2011, at the conclusion of the Ruckelshaus study, the state legislature amended the GMA to establish the Voluntary Stewardship Program, an alternative to critical areas regulation for farm lands which was made available to counties electing to participate.[6] Snohomish County opted not to participate in the stewardship program but instead reviewed and revised its existing critical areas regulations to make them consistently applicable to agricultural activities throughout unincorporated Snohomish County. Mr. Postema again was an active participant in the County's process, providing significant input to the planning commission.[7] The critical areas provisions for agriculture were adopted in Amended Ordinance 13-042 (hereafter "2013 CAR") and were not challenged.

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[1] Snohomish County's Prehearing Brief (March 4, 2016) (hereafter, "County Brief"), at 3-4.
[2] SSB 5248 (Chapter 353, Laws of 2007).
[3] Ex. 3.7.1, Amended Ordinance 06-061, at 37; County Brief at 4.
[4] Ex. 3.7.2 (212), (592), (606), (607), (608), (1755).
[5] *Pilchuck Audubon Society and Futurewise v Snohomish County (Pilchuck VII),* GMHB No. 07-3-0033, Final Decision and Order (April 1, 2008), finding that the County's regulations complied with the GMA.
[6] ESHB 1886 (Chap. 360, Laws of 2011), codified at RCW 35.70A.700-760.
[7] Ex. 3.7.4 (176) (2-19-2013); Ex. 3.7.4 (179) (3-23-2013)

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In response to the GMA requirement for periodic review and update of critical areas protections in light of new science, Snohomish County revised its regulations most recently in Amended Ordinance 15-034 (hereafter "2015 CAR"). Mr. Postema again participated in the citizen comment process, providing a detailed alternative regulatory proposal for critical areas in agricultural lands that addressed a number of perceived flaws in the County's scheme.[8] The 2015 CAR made several amendments to the 2013 CAR provisions concerning agricultural activities, which Mr. Postema challenges here.

One other regulatory system is germane to the present dispute – the County's shoreline controls. The Shoreline Management Act requires local jurisdictions to update their shoreline master programs in light of Department of Ecology guidelines codified at WAC 197-11. Snohomish County adopted its updated Shoreline Management Program in 2012 with Ordinance 12-025, (hereafter "2012 SMP"). Provisions in the 2012 SMP concerning agriculture generated an appeal to the Board from the Snohomish County Farm Bureau, the Board upholding the County.[9]

The Board held a hearing on the merits of Mr. Postema's 2015 CAR challenge on March 23, 2016, in Everett. Richard Stephens appeared for and was accompanied by petitioner John Postema. Respondent Snohomish County ("County") appeared through its attorney Alethea Hart, accompanied by Deputy Prosecuting Attorney Laura Kisielius, Planning Director Troy Holbrooke, and other County staff. Board member Margaret Pageler convened the hearing as the Presiding Officer with Board members Cheryl Pflug in attendance and William Roehl participating telephonically. The hearing provided the Board an opportunity to ask questions to clarify important facts in the case and ensure a clearer understanding of the legal arguments of the parties.

[8] Ex. 1.3.5.5.a-d.
[9] *Snohomish County Farm Bureau v. Snohomish County (SCFB I),* GMHB 12-3-0008, Final Decision and Order (March 25, 2013).

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JURISDICTION

The Board finds the petition for review was timely filed pursuant to RCW 36.70A.290(2). The Board finds the petitioner has standing to appear before the Board pursuant to RCW 36.70A.280(2)(b). The Board finds it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1).

STANDARD AND SCOPE OF REVIEW

The Growth Management Hearings Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant comprehensive plans, development regulations, or amendments thereto.[10]

Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption.[11] This presumption creates a high threshold for challengers as the burden is on the petitioners to demonstrate that any action taken by the county is not in compliance with the GMA.[12]

The scope of the Board's review is limited to determining whether the county has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review.[13] In making its determination, the Board shall consider the criteria adopted by the Department of Commerce under RCW 36.70A.190.[14] The Board shall find compliance unless it determines that the county's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.[15] In

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[10] RCW 36.70A.280, RCW 36.70A.302. *Lewis County v. Western Washington Growth Management Hearings Board*: 157 Wn.2d 488, 498, n. 7, 139 P.3d 1096 (2006): "The Board is empowered to determine whether [jurisdiction's] decisions comply with GMA requirements, to remand noncompliant ordinances to [the jurisdiction], and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance."

[11] RCW 36.70A.320(1) provides: "[C]omprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption."

[12] RCW 36.70A.320(2) provides: "[T]he burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter."

[13] RCW 36.70A.290(1).

[14] Procedural criteria adopted by Commerce pursuant to RCW 36.70A.190(4)(b) are found at WAC 365-196. Commerce has also adopted minimum guidelines pursuant to RCW 36.70A.050 for the classification of agriculture, forest, and mineral lands and critical areas; these rules are found at WAC 365-190.

[15] RCW 36.70A.320(3).

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order to find the county's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been committed."[16]

In reviewing the planning decisions of cities and counties, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities" and to "grant deference to counties and cities in how they plan for growth."[17] However, the jurisdiction's discretion is not boundless; its actions must be consistent with the goals and requirements of the GMA.[18]

Thus, in the present case, the burden is on Mr. Postema to overcome the presumption of validity and demonstrate that the County's adoption of Ordinance 15-034, the 2015 CAR, is clearly erroneous in light of the goals and requirements of the GMA.

A specific restriction to the Board's scope of review arises when a party challenges a comprehensive plan or development regulation that has been "updated" in response to GMA planning cycles. The Supreme Court has ruled that the periodic updates required in the statute do not create an open season for challenges to previously-adopted provisions that are carried over into the new plan or code.

> The legislature intended for the update process to include an assessment of whether a comprehensive plan complies with recent amendments to the GMA. … The update process "provides the vehicle for bringing plans into compliance with recently enacted GMA requirements and for recognizing changes in land usage or population. It creates no 'open season' for challenges previously decided or time-barred." *Gold Star Resorts, Inc. v. Futurewise,* 140 Wn. App. 378, 390, 166 P.3d 748 (2007), [aff'd 167 Wn.2d 723 (2009)].[19]

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[16] *Lewis County v. WWGMHB ("Lewis County")*, 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006) (citing to *Dept. of Ecology v. PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)).

[17] RCW 36.70A.3201 provides, in relevant part: "In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community."

[18] *King County v. CPSGMHB,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000) (Local discretion is bounded by the goals and requirements of the GMA). *See also*, *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007).

[19] *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 344, 190 P.3d 38 (2008).

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Thus a party may challenge only new or amended plan and regulatory provisions in an update.[20] Challenge to unchanged provisions is time-barred except where required by a recent GMA legislative amendment, new population forecast, or changed science concerning protection of critical area functions and values. In the case before us, the Board's scope of review is therefore limited to new or amended provisions in the 2015 CAR and to the application of any changed critical areas science.

ISSUES AND ANALYSIS

Mr. Postema's legal issues are set forth in the prehearing order as follows:

> Petitioner alleges the following issues regarding the County's adoption of Ordinance No. 15-034, particularly Sections 23-25 and 36-42:[21]
>
> 1. Ordinance No. 15-034 as it relates to agriculture is not based on Best Available Science as required by RCW 36.70A.172.
>
> 2. Ordinance No. 15-034 conflicts with other development regulations and the comprehensive plan, including Goal NE 4 and Objective LU 7.C, and the Shoreline Management Plan, including inconsistent buffer requirements and different definitions of agriculture or agricultural lands.
>
> 3. Ordinance No. 15-034 conflicts with the GMA Goal in RCW 36.70A.020(8) to maintain and enhance natural resource-based industries and with RCW 36.70A.060 and entitles the Board to grant relief pursuant to RCW 36.70A.320 (3).

The County asserts Mr. Postema's challenges are untimely, are inadequately briefed,[22] and fail on the merits. The Board concurs, as set forth below.

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[20] *Gold Star Resorts, Inc. v. Futurewise,* 167 Wn.2d 723, 733-734, 222 P.3d 791 (2009): Our decision in *Thurston County* resolves two of the issues raised by the parties. First, we held that "a party may challenge a county's failure to revise a comprehensive plan only with respect to those provisions that are directly affected by new or recently amended GMA provisions." *Id*. at 344. This means "those provisions related to mandatory elements of a comprehensive plan that have been adopted or substantively amended since the previous comprehensive plan was adopted or updated, following a seven year update." *Id.* This holding confirms the Court of Appeals' holding in this case that Futurewise could challenge the portions of the County's comprehensive plan affected by the GMA amendments pertaining to LAMIRDs but, contrary to Futurewise's argument, could not challenge any and all aspects of the plan alleged to be noncompliant with the GMA.

[21] The County filed a timely objection to the statement of issues, particularly pointing out petitioner's failure to indicate the statutory basis for Issue 2.

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Issue 1. Best Available Science

Mr. Postema argues the County failed to consider the science concerning the decline of agriculture in Snohomish County and the relation between environmental over-regulation and failing agriculture. The Best Available Science ("BAS") concerning agriculture, according to Postema, documents a rapidly declining farm economy in the County.

> Snohomish County lost 6000 acres of farmland in the last 5 years…. We lost 11% of our full time farmers during the last 5 years. In addition we lost 232 farms since 2007…. The 2012 Census report is the best available science we have.[23]

Postema's Reply underscored his contention that the County failed to include and consider BAS concerning the decline of agriculture in the County.

> Postema was quite clear that the BAS which he asserts was not included or considered substantively was *the undisputed science that agriculture industry is not being maintained*, let alone enhanced. There are references to the science in the record on this issue, namely the United States Census data. *See, e.g.,* Ex. 1.3.5.5.d, at 2; Ex. 2.2.1.1, at 8-9.This science was ignored. … *The only science* reflects that the industry is declining in Snohomish County." [24]

Under the GMA, critical areas are areas and ecosystems of the natural environment requiring special designation and regulatory protection. RCW 36.70A.060(2), RCW 36.70A.030(5), RCW 36.70A.170(1)(d). The Best Available Science requirement for critical areas regulation is set forth in RCW 36.70A.172(1):

> In designating and protecting critical areas under this chapter, counties and cities *shall include the best available science* in developing policies and development regulations *to protect the functions and values of critical areas*. (Emphasis added)

Postema's legal theory is that the statutory requirement for inclusion of science is not limited to protection of the functions and values of elements of the natural environment. Rather, he asserts that science must be consulted concerning industries or uses affected by

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[22] At hearing, the County registered a continuing objection to consideration of any issues or arguments that went beyond those stated in the issue statements and actually briefed in petitioner's opening brief.
[23] Ex. 2.2.1.1, p. 9; Postema comment to Planning Commission, February 1, 2015.
[24] Petitioner Postema's Reply Brief (March 15, 2016) (hereafter, "Postema Reply"), at 5 (Emphasis added).

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the protective regulations. Postema's briefs and oral argument provide no Board or appellate case law as authority for this novel extension of BAS, nor is the Board aware of any. The Board's review of the regulatory guidelines for critical areas ordinances (WAC 365-190) and best available science (WAC 365-195) has identified no provision suggesting BAS analysis must be applied to questions beyond "protection of functions and values of critical areas" themselves.

In sum, the Board finds no basis for extending the BAS requirement to consideration of the viability of agriculture in Snohomish County. Agricultural viability is a policy consideration, along with other local priorities, that may be balanced with the environmental protections supported by BAS. In the present record, a County staff report to the planning commission references "ongoing conversations" about protection and enhancement of agriculture and a process to achieve "Ag net gain." The staff advised the planning commission that the larger scope of the agricultural enhancement project was not part of the critical areas update.[25] Postema's contention that BAS analysis must be applied to the status of agriculture in the critical areas review is without merit.

Postema's opening brief also contends wetland buffer widths are not based on BAS, referencing two studies submitted in the 2005 proceedings: Ex. 3.7.2 (1657) Crittendon memo and Ex. 3.7.2 (1857) GEI Report. Postema appeared to withdraw the buffer width contention in oral argument. In any event, objection to buffer widths is untimely. The 2015 CAR made no changes to wetland buffer widths.[26] The only changes to wetland regulations were amendments to the classification scheme to bring the regulations in line with updated Ecology science concerning wetland typology.[27]

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[25] Ex. 2.1.7.1, p. 4, Staff report to Planning Commission, January 14, 2015.
[26] County Brief, at 13.
[27] Amended Ordinance 15-034 at 8 ("New literature in several key areas has been reviewed, including but not limited to: stormwater, buffers, land use intensity, wetlands, wildlife, agriculture, aquifer recharge areas, landslide and other geologic hazards. *With the exception of* landslide hazard areas and *wetland categorization,* the BAS review *did not find new science* that indicates that any significant changes to the critical area regulations are warranted." Emphasis added). Amended Ord. 15-034 at 10 ("The amendments to the tables in SCC 30.62A.320 are necessary for clarity and to reflect *new BAS regarding the classification of wetlands* from the State of Washington and to be consistent with the Washington State Department of Ecology state permit requirements related to shorelines and water quality. It is necessary to clarify that this section

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The County points out that the record shows the two studies referenced by Mr. Postema were considered for the 2007 CAR. The 2007 buffer regulations, including the range of buffer widths, were retained in the 2013 CAR and made to apply to agricultural activities in the 2013 revisions. Any challenge to the science concerning buffer widths applicable to critical areas in agricultural lands should have been brought within sixty days of publication of the 2013 CAR.[28] The Board dismisses allegations of BAS violations concerning buffer widths as untimely.

Issue 2. Conflicting Provisions.

Postema contends the 2015 CAR contains regulations that directly conflict with other elements of Snohomish County's comprehensive plan and shoreline management program.[29] The 2015 CAR made three amendments to critical areas provisions concerning agricultural activities:

- CARA exemption - SCC 30.62C.010(2)(b).
- "Agricultural activities" definition – Reference to SCC 30.91A.092 in SCC 30.62A.630 and 30.62B.520.
- Farm conservation plans - SCC 30.62[A].640[30] and SCC 30.62B.540.

Upon review of these amendments, the Board finds Postema's objections unpersuasive, as set forth below.

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addresses both requirements for buffers and impervious surfaces within and outside buffers. This amendment is consistent with GPP Policy NE 3.B.9: The county should adopt a water typing system and *wetland classification systems* consistent with state guidelines.").

[28] See*Thurston County v. Western Washington Growth Management Hearings Board,* 164 Wn.2d 329, 344, 190 P.3d 38 (2008).

[29] The County asserts Legal Issue 2 must be dismissed because Mr. Postema failed to indicate the specific statutory basis for his consistency challenges [identified in Postema Reply as RCW 36.70A.040 and .130]. The Board agrees that this may be a basis for dismissal but chooses to address Mr. Postema's concerns on the merits.

[30] When citing to SCC 30.62A.600-640, Postema persistently omits the A throughout his pleadings.

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CARA Exemption - SCC 30.62C.010(2)(b)

One amendment made in the 2015 CAR with respect to agriculture appears to repeal exemptions for agricultural activities in critical aquifer recharge areas (CARAs). Postema points out the 2015 CAR amends the "Purpose and Applicability" section of the CARA regulation – SCC 30.62C.010(2)(b) - by deleting an agricultural exemption:

> (2) This chapter applies to … (b) agricultural activities … ~~except that certain agricultural activities as defined in SCC 30.64.010 occurring on rural and agricultural resource lands are exempt from this chapter and are subject only to chapter 30.64 SCC~~….

The County asserts this deletion was simply a "housekeeping" amendment which was necessary because chapter 30.64 SCC has been repealed and no longer applies. The Board agrees.

Chapter 30.64 SCC contained earlier agricultural exemptions resulting from the Ruckleshaus timeout. When the 2013 CAR was enacted, the agricultural exemptions were deleted and a new regulatory scheme was imposed. A review of Ordinance 13-042 – the 2013 CAR - indicates the County made exemption deletions similar to the one that Postema complains about now but in the 2013 ordinance the changes only affected *Wetlands and FWHCAs (30.62A.010)* along with *Geologically Hazardous Areas (30.62B.010).* Excerpts below are from Ordinance 13-042:

> 30.62A.010 Purpose and applicability. *[Wetlands and FWHCAs]*
> (2) This chapter applies to:
> (b) Agricultural activities, which are subject only to Part 600 of this chapter~~((; except that certain agricultural activities as defined in SCC 30.62.015(1) occurring on rural and agricultural resource lands are exempt from this chapter and are subject only to chapter 30.62 SCC)).~~
>
> 30.62B.010 Purpose and applicability*. [Geologically Hazardous Areas]*
> (2) This chapter applies to:
> (b) Agricultural activities, which are subject only to Part 600 of this chapter ~~((; except that certain agricultural activities as defined in SCC 30.62.015(1) occurring on rural and agricultural resource lands are exempt from this chapter and are subject only to chapter 30.62 SCC)).~~

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Perhaps by oversight, Ordinance 13-042 did not similarly amend 30.62C.010 *[Critical Aquifer Recharge Areas].* So in the 2015 CAR the County made the parallel change to the CARA regulations. The following excerpt is from Ordinance15-034:

> 30.62C.010 Purpose and applicability.
> (1) The purpose of this chapter is to designate and protect critical aquifer recharge areas . . .
> (2) This chapter applies to:
>
> (b) Agricultural activities as defined in SCC 30.91A.090 or SCC 30.91A.092 ~~((; except that certain agricultural activities as defined in SCC 30.64.010 occurring on rural and agricultural resource lands are exempt from this chapter and are subject only to chapter 30.64 SCC))~~ and

As explained in the findings to the 2015 Ordinance, "The amendment to SCC 30.62C.010(2)(b) is necessary to reflect that chapter 30.64 SCC no longer applies, has a sunset date which has passed and is proposed to be deleted by this ordinance."[31] The 2007 CAR with its agricultural exemptions was previously repealed, and the 2015 CAR was belatedly amended to acknowledge the deletion. Consequently, **the Board finds** the amendment to SCC 30.62C.010(2)(b) is a necessary scrivener's correction of prior legislation and creates no basis for substantive challenge on consistency or any other theory.

"Agricultural Activities" Definition – Referencing SCC 30.91A.092 in SCC 30.62A.630 and 30.62B.520, .530

A second set of 2015 CAR amendments cross-references definitions of agricultural activities from the County's shoreline management program. Mr. Postema protests the conflicting definitions of *agricultural land* and *agricultural activities* in the CAR and the SMP. Postema contends that the result of these definitional inconsistencies will be to limit expansion of farming.

[31] Amended Ord. 15-034, Section 1.L.2 at 16

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The 2015 CAR at SCC 30.62A.630 and 30.62B.520, .530 references SMP definitions of "agricultural activities" in SCC 30.91A.090 and .092 and makes these the applicable definitions for CAR purposes.

The SMP defines "agricultural activities" in SCC 30.91A.092: [32]

> "Agricultural activities" means agricultural uses and practices including, but not limited to: producing, breeding, or increasing agricultural products; rotating and changing agricultural crops; allowing land used for agricultural activities to *lie fallow* in which it is plowed and tilled but left unseeded; allowing land used for agricultural activities to *lie dormant* as a result of adverse agricultural market conditions; allowing land used for agricultural activities to *lie dormant* because the land is enrolled in a local, state, or federal conservation program, or the land is subject to a conservation easement; conducting agricultural operations; maintaining, repairing, and replacing agricultural equipment; maintaining, repairing, and replacing agricultural facilities, provided that the replacement facility is no closer to the shoreline than the original facility; and maintaining agricultural lands under production or cultivation. (Emphasis added)

Incorporating this definition into the 2015 CAR allows recognition that fallowing and conservation set-asides are "agricultural activities."[33] However, Postema objects that the SMP has a separate definition of "agricultural land" at SCC 30.91A.102 which is not adopted into the critical areas regulation ordinance. "The conflict is in having definitions of agricultural activities defined in one way, while agricultural land is defined as another."[34]

The 2012 SMP at SCC 30.91A.102 defines "agricultural land:"

> "Agricultural land" means those specific land areas on which agriculture

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[32] Note following SCC 30.91A.092: "This definition applies only to shoreline regulations in chapters 30.44 and 30.67 SCC and critical area regulations in chapters 30.62A and 30.62B SCC."

[33] *See also*, recognition of fallowing and conservation set-asides in the Shoreline Management Act definition of "agricultural activities" at RCW 90.58.065(2)(a):

> … rotating and changing agricultural crops; **allowing land used for agricultural activities to lie fallow in which it is plowed and tilled but left unseeded; allowing land used for agricultural activities to lie dormant** as a result of adverse agricultural market conditions; **allowing land used for agricultural activities to lie dormant** because the land is enrolled in a local, state, or federal conservation program, or the land is subject to a conservation easement;… (Emphasis added)

[34] Postema Reply, at 11.

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> activities are conducted as of the date of adoption of the Shoreline Management Program (SMP) June 6, 2012) as evidenced by aerial photography or other documentation. After the effective date of the SMP, land converted to agricultural use is subject to compliance with the requirements of the SMP.

Mr. Postema points out that the SMP agricultural land definition requires documentation of agricultural use by aerial photo in 2012, which would subject any farmer seeking to re-farm fallow land to the "new ag" permitting and farm plan requirements. This creates a contradiction in the regulatory system that interferes with agricultural viability, he contends.[35]

The County responds that the SMP's agricultural land definition has not been imported into the 2015 CAR. Nor do the new CAR requirements concerning agriculture apply in the shoreline area.[36]

The Board has not been shown any amendment to the 2015 CAR that incorporates the SMP agricultural land definition of SCC 30.91A.102. While having different rules for farming in the shoreline and in the rest of the County may be confusing, **the Board finds** Postema has not demonstrated the kind of internal contradiction that would support an inconsistency ruling by the Board on this question.

Farm Conservation Plans - SCC 30.62[A].640 and SCC 30.62B.540.

The most significant 2015 CAR amendments relating to agriculture are the new farm conservation plan provisions in SCC 30.62A.640 and 30.62B.540. The County's findings in Ordinance 15-034 explain that the new farm plan requirements provide County oversight,

[35] Petitioner Postema's Prehearing Brief (February.12, 2016) (hereafter, "Postema Brief"), at. 12.
[36] County Brief, at. 25-26: "Accordingly, the County cannot conceive, and Petitioner does not explain, how a definition not adopted, amended or referenced in Amended Ord. 15-034 "requires activities" regulated under the challenged ordinance "to be documented" in a manner that could form any legitimate basis to challenge Amended Ord. 15-034."

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from approval of the plan to monitoring its implementation.[37] Mr. Postema asserts that the provisions are onerous and intrusive. As he explains:

> In 2013, the County applied its critical area regulations to all agricultural activities, namely all shoreline areas and all rural areas, but it provided an exemption for agricultural activities that had an approved farm plan. *See, e.g.,* SCC 30.62A.620; SCC 30.62B.520. In 2015, the County eliminated that exemption and created a completely different type of farm plan that is more onerous than the prior farm plan based on best management practices. *See e,g,*, SCC 30.62[A].640; SCC 30.62B.540. In general, this is the 2015 change which is not based on best available science because there is no consideration how these changes when combined with other changes has prevented the County from maintaining and enhancing the agriculture industry as required under the GMA.[38]

Postema contends this new farm plan scheme is inconsistent with County comprehensive plan goals and policies. "Consistency" is a term of art in GMA jurisprudence. In *Chevron USA Inc., v Hearings Board*, the Court of Appeals defined "consistency" as applied to GMA plans and regulations: "Consistency means that provisions are compatible with each other – they fit together properly. In other words, one provision may not thwart another."[39]

Establishing a development regulation's inconsistency with comprehensive plan goals is a difficult hurdle to surmount.[40] As the Board stated in *Leenstra v. Whatcom County*: [41]

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[37] Amended Ordinance 15-034, Section 1.J.46, at 12: "One of the ways agricultural activities can comply with chapter 30.62A SCC is when such activities are conducted in compliance with a farm conservation plan as described in part 600 of chapter 30.62A SCC. The amendments to part 600 are necessary for the County to ensure that farm conservation plans are implemented fully, are monitored for continued compliance with the farm conservation plan and to ensure no impacts to critical areas. Therefore a new section SCC 30.62A.640 has been added, which sets forth reasonable provisions to ensure implementation and monitoring of farm conservation plans."

[38] Postema Reply, at 39.

[39] 123 Wn. App. 161, 167, 93 P.3d 880 (2004), *aff'd* 156 Wn.2d 131 (2005).

[40] *Friends of the San Juans, et al v San Juan County*, GMHB Case No. 13-2-0012c, Final Decision and Order (September 6, 2013), at 23.

[41] GMHB 03-2-0011, Final Decision and Order (September 26, 2003), at 15 (Emphasis added); see also *Peranzi v City of Olympia*, GMHB 11-2-0011, Final Decision and Order (May 4, 2012), at 21-22; *C. Dean Martin v. Whatcom County*, GMHB 11-2-0002, Final Decision and Order (October 12, 2010), at 16-17.

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> A finding of inconsistency requires a showing of *actual conflict between competing provisions* of a city's planning policies and development regulations…. Moreover, a city's planning goals cannot be examined in isolation from one another …

The Board reviews the following comprehensive plan policies (titled as either goals, policies, or objectives) cited by Mr. Postema and finds that the new farm plan provisions do not contradict or thwart these policies.

> *Providing regulatory flexibility*
> Objective NE 4.A Provide flexibility in regulations to provide protection of the natural environment while recognizing the need to promote viability in the commercial agricultural industry.

Mr. Postema contends that County oversight of farm operations through the farm conservation plan provisions is onerous and lacks the flexibility required by County Objective NE 4.A. However, as detailed by the County at the hearing on the merits, each applicable section of the 2015 CAR provides a range of options for farmers to implement protections for critical areas. Under "general agricultural conditions," the options are (a) best management practices ("BMPs") under NRCS standards, (b) other recognized BMPs, or (c) a farm conservation plan. SCC 30.62A.620, SCC 30.62B.520. Under "special agricultural conditions," the options are (a) compliance with the general CAR provisions, (b) a farm conservation plan, or (c) a written decision from the planning director based on other regulations or permit conditions. SCC 30.62A.630, SCC 30.62B.530.

The County explains the new farm conservation plan provisions - SCC 30.62A.640, SCC 30.62B.540 - are part of this flexible continuum of critical areas regulation for farmers. Postema objects that the required approval and monitoring by county staff makes the new farm plan amendments inimical to the viability of commercial agriculture. However, the Board notes there are other options available under the County's regulatory scheme. Postema's burden is to demonstrate that the addition of a more detailed procedure for approval and monitoring of farm plans, as one component of a flexible regulatory continuum, somehow frustrates County Objective NE 4.A. **The Board finds** that Postema

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has not met his burden to prove that the new farm plan provisions are inconsistent with Objective NE 4.A.

> *Enhancing and encouraging agriculture.*
>
> Objective LU 7.C Enhance and encourage the agricultural industry through development and adoption of supporting programs and code amendments.
>
> LU Policies 7.C.1 The Agricultural Advisory Board shall provide advice on and recommendations for goals, policies, programs, incentives and regulations related to agriculture and agricultural conservation.
> …
> 7.C.6 The county shall support the use of innovative agricultural technologies, procedures and practices that protect existing land, soil and water resources.
> …
> 7.C.8 The county shall expand opportunities for the agriculture community to participate in economic development, code development and public policy initiatives related to agriculture and agricultural practices.

Postema's argument is that because agriculture is fragile in Snohomish County, the imposition of the new farm plan provisions conflicts with the comprehensive plan policies of collaboration with the farm community in developing code amendments and regulations.

The County responds with a summary of its initiatives to support agriculture, pointing to the narrative in the County comprehensive plan.[42] The plan narrative explains the decline of dairying in Snohomish County and the County's strategic action to support a transition to smaller diversified crop farms:

> To respond to the challenges facing Snohomish County farmers, the Agricultural Advisory Board, county staff, the county council and the Executive's office together with local farmers began to take steps to increase the economic viability of agriculture in Snohomish County.[43]

The narrative lists early actions taken by the County – support for harvest celebrations, coordinated farm marketing ("Puget Sound Fresh"), transfer of development rights programs, farmers markets and farm stands, dedicated County staff and website ("Focus on Farming"). In 2010, the County launched the Sustainable Lands Strategies

[42] County Brief, at 29-30, referencing Appendix H, at 2-3.
[43] Appendix H at 2.

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Initiative, a County partnership with agriculture advocates, environmental organizations, and tribes. The goal of the Initiative is "to accommodate both habitat restoration for threatened and endangered species and *protection of agricultural resource lands*, in a manner that would *generate net gains for the agricultural*, tribal cultural and ecological productivity and health in Snohomish County."[44]

It is apparent to the Board, even on this limited record, that Snohomish County policy makers are consulting with farmers, the Conservation District, and other advocates for agriculture, though perhaps not the ones who share Mr. Postema's viewpoints. In what way does the addition of a more detailed procedure for approval and monitoring of farm plans, opposed by Mr. Postema but supported by other farm interests, conflict with Objective LU 7.C and its listed policies? Postema has simply not met his burden to show such a conflict. **The Board finds** that Postema fails to demonstrate that the new farm plan provisions are inconsistent with Objective LU 7.C.

Balancing goals of environment and agriculture.

> GOAL NE 4 Balance the goals of protecting elements of the natural environment while promoting the long-term viability of commercial agriculture.

In Mr. Postema's view, the new CAR provisions for farm plans which require county approval and monitoring - SCC 30.62A.640 and 30.62B.540 - are restrictive, intrusive, and costly, and will lead to the loss of farm land. [45] As applied to an industry that is already struggling in Snohomish County, Postema asserts that the 2015 CAR upsets the balance between agricultural viability and environmental protection required by Goal NE 4.[46]

Comprehensive plans by their nature address a range of public policy goals which require balanced consideration. Thus, the Board has noted, "[i]t would be inappropriate to consider individual comprehensive plan goals in isolation from one another or to consider

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[44] Appendix H at 2-3 (Emphasis added).
[45] Postema Brief at 10: "Under the Ordinance, the need for any permit now requires wetland delineations even if farming has been going on for a century and even though federal law does not regulate wetlands that are prior converted croplands. The wetland buffers will take land away from productive farm use, and not protect, existing agricultural resources."
[46] Postema Reply, at 12.

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individual development regulations without looking at all related comprehensive plan policies. While a specific development regulation may not appear to foster fulfillment of a specific planning goal, it may clearly serve to carry out a different comprehensive plan goal."[47]

The Board has previously reviewed Snohomish County's Goal NE 4 in the context of a challenge to comprehensive plan amendments in 2012.[48] As an early step in its Sustainable Lands Strategies Initiative, the County adopted Amended Ordinance 12-047, amending its comprehensive plan Agricultural Lands section and Natural Environment chapter to create a balance between preservation of agriculture and environmental protections. The Board's decision in *Snohomish County Farm Bureau II* calls out some of the policies adopted or amended in Ordinance 12-047 that provide context for Postema's challenge in the present case:

> *Agricultural Lands Policy LU 7.B.7*: " … coordinate the use of agricultural resource lands with the preservation of ecological functions and values…."
>
> *Natural Environment Policy NE 1.A.7*: "… prioritizing natural resource industry uses and natural environment protection enhancement and/or restoration …"
>
> *Natural Environment Policy NE 1.C.2 :* "…(c) coordinating the use of agricultural resource lands with the protection, restoration and/or enhancement of ecological functions and values;" "(d) …optimize natural and/or agricultural resource values and ecological function."
>
> *Natural Environment Policy NE 4.A.6*: "… conserve agricultural resource lands and restore ecological function and values, seeking to increase both ecological and agricultural resource viability and productivity."

Clearly Snohomish County's policies require an equal emphasis on protecting environmentally critical areas and enhancement of agriculture. Mr. Postema speculates that a farm conservation plan requiring County approval and monitoring puts too heavy a burden

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[47] Koontz Coalition v. City of Seattle, GMHB 14-3-0005, Final Decision and Order (August 19, 2014), at 19; *Glen Cook and Kathleen Heikkila v. City of Winlock*, GMHB 09-2-0013c, Final Decision and Order (October 8, 2009), at 35.

[48] *Snohomish County Farm Bureau v Snohomish County (SCFB II)*, GMHB 12-3-0010, Final Decision and Order (May 2, 2013), at 9-11, 18-21.

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on the farmer. However, he provides no record beyond an assumption of regulatory overreach on which the Board can find that the County's judgment was clearly erroneous. **The Board finds** Mr. Postema has failed to demonstrate that the new farm plan provisions, in the context of flexible regulatory options, are inconsistent with the County's commitment to balance the goals of environmental protection and viability of agriculture.

Conclusion concerning Conflicting Provisions

The Board concludes that Mr. Postema has not demonstrated that any of the amendments concerning agriculture in the 2015 CAR create inconsistencies internally or externally with cited plan policies or regulations. The issue of conflicting provisions is dismissed.

Issue 3. Violation of Goal to Enhance Agriculture

RCW 36.70A.020(8): GMA Planning Goal 8 provides:

> Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

Mr. Postema points out GMA Goal 8 concerning natural resource industries is worded: "Maintain and enhance" productive agricultural industries. By contrast, GMA Goal 10 concerning the environment is worded: "Protect" the environment. The Courts have explained that GMA Goal 10 *protects* the existing functions and values of critical areas but does not require their restoration.[49] By contrast, Goal 8 requires not just *conservation* of agricultural lands but *enhancement* of the industry. Mr. Postema contends that the 2015 CAR and the new farm plan provisions codified in SCC 30.62A.640 and 30.62B.540, "changed the Farm Plan rules, made them more restrictive and applied them to an industry that is struggling," thus violating the goal to "maintain and enhance" agriculture.

[49] In *Swinomish Indian Tribal Community, et el. v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 424-426, 166 P.3d 1198 (2007).

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The Supreme Court in *Swinomish Indian Tribal Community v. Skagit County,*[50] determined GMA Goal 8 does not establish a planning priority as between preservation of land for agricultural use and protection of critical areas.[51] However, the Court recognized that fisheries industries are also natural resource industries to be maintained and enhanced pursuant to Goal 8. Critical area regulations that protect fish and wildlife habitat functions and values are therefore necessary in order to "maintain and enhance" fisheries as a natural resource industry.[52] Thus the Board in *Snohomish County Farm Bureau II* concluded that Snohomish County's Comprehensive Plan policies that commit the County to "net gains" for both salmon restoration and the agricultural industry are not inconsistent with Goal 8.[53]

In the case before us, the burden is on Postema to demonstrate that the new farm conservation plan provisions, as one option in protecting critical area functions and values in Snohomish County, thwart GMA Goal 8 of maintaining and enhancing agriculture. **The Board finds** Postema has failed to meet his burden and the issue is dismissed.

ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board orders and case law, having considered the arguments of the parties and having deliberated on the matter, the Board finds:

- Petitioner John Postema has failed to carry his burden of demonstrating Snohomish County's adoption of Amended Ordinance 15-034 is non-compliant with the best available science requirements of RCW 36.70A.172(2), creates an

[50] *Swinomish Indian Tribal Community, et al. v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 424-426, 166 P.3d 1198 (2007).
[51] *Id.* at 425.
[52] The Court described the anadromous fish stocks in the Skagit and Samish River systems as a valuable natural resource "also of economic significance because just as farmers depend on agricultural land for their livelihood, persons involved in the fishing industry and belonging to the Tribe depend on healthy rivers for theirs." *Id.* at 426. The *Swinomish* Court recognized the tension between the conservation of productive agricultural lands as stated in Goal 8 and the RCW 36.70A.172(1) duty to "give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries."
[53] *SCFB II*, FDO, p. 15.

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internal or external inconsistency, or violates GMA Planning Goal 8, RCW 36.70A.020(8).

The Boards ORDERS:

- The matter of *John Postema v Snohomish County,* Case No. 15-3-0011*,* is **dismissed** and the case is **closed**.

ENTERED this 8th day of April, 2016.

_____
Margaret Pageler, Board Member

_____
Cheryl Pflug, Board Member

_____
William Roehl, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[54]

[54] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the Board shall be served on the Board but it is not necessary to name the Board as a party. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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